IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION (L) NO. 556 OF 2006

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Vama Apparels (India) Pvt.Ltd. ...Petitioner

v/s.

Juniper Hotels Pvt.Ltd. ...Respondent

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Mr.A.Y.Bookwala with Mr.M.N. Thakore i/b M/s.Thakore Jariwala & Associates for the Petitioner.
Mr.N.H.Seervai with Mr.Chirag Balsara i/b Kaitan & Co. for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 10TH OCTOBER,2006

P.C.:

1. This petition is filed under Section 9 of

Arbitration Act for interim relief restraining the Respondent from preventing the Petitioner and their employees from carrying on business and running their hotel in the premises which are described in prayer clause (a).

2. The Respondent has a hotel, wherein because of the agreement dated 24th August, 2005 the Respondent permitted the Petitioner to run a store. That agreement has been terminated by the Respondent by notice dated 2nd September, 2006. The principal reason for terminating the agreement is that as per the agreement the Petitioner was liable to pay to the Respondent at the rate of Rs.16.50 lakh per month from April, 2006. The Petitioner has not paid that amount. As per the agreement the Petitioner was also liable to pay Rs.15 lakh as security deposit in April, 2006. That has also not been paid. The Petitioner does not dispute that as per the agreement the Petitioner was liable to pay Rs.16,50,000/- per month from April, 2006. He also does not dispute that he has not paid that amount till date. The Petitioner also does not dispute that he was to pay Rs.15 lakh as security deposit in April, 2006 and he has not paid the same.

3. According to the Petitioner, initially the Petitioner was liable to pay Rs.5 lakh per month and that then it was to be increased to Rs.16.50 lakh per month from April, 2006. According to the Petitioner, he did not pay at the rate of Rs.16.50 lakh per month from April, 2006 because according to the Petitioner, the Respondent was under an obligation to run Coffee shop in the premises and the portion of the profit from the business of the Coffee shop was to be given to the Petitioner. But the Respondent failed to perform that obligation. According to the Petitioner, there was also some dispute between the parties regarding fixing of separate electricity meter. However, perusal of the clauses of the agreement to which the Petitioner has admittedly agreed shows that the Petitioner was not at all justified in withholding the payment which he became liable to make under the agreement. Clause 3(f) of the agreement reads as under:-

> 3(f) The Company shall not withhold payment of any Fees payable by the Company to JHPL on the date herein mentioned under any circumstances whatsoever. However, in case of delay in

> payment, the Company shall be liable to pay interest at the rate of 18% per annum for the period during which the delay takes place. Payment of such interest however shall not limit the right of JHPL to terminate this Agreement as specified in Clause 7 hereof.

4. Thus, for no reason the Petitioner could have withheld the payment. The intention behind incorporating this clause is clear that whatever payment the Petitioner is liable to make will be made by the Petitioner subject to claiming adjustment subsequently. The clear intention of the term of the agreement is that the Petitioner cannot unilaterally take a decision of withholding the payment. As per clause 4(a) of the agreement, the security deposit was to be Rs.65,00,000/-. Out of that Rs.50 lakh was already paid and Rs.15 lakh was to be in April. For that purpose post-dated cheques were also given. Admitted position is that those cheques have bounced and no payment was made. I do not find any justification given why the amount of security deposit was not paid, if it was the intention of the Petitioner to continue the arrangement brought about by the agreement. Clause 4(b) of the agreement reads

as under:-

> 4(b) The Company shall promptly and punctually pay the Fees being all sums due under clause 3 hereinabove as and when they become due and payable and the Company shall make such payments within the stipulated time in the manner the same are payable. The Company agrees that these payments shall not be made in installments. The Company agrees that failure to make payment of the Fees as specified in Clause 3 hereinabove within the period specified therein shall be terminable breach under Clause 7 of this Agreement.

5. Thus, the Petitioner has undertaken the liability by this agreement to make payment promptly and he has also agreed that his failure to make payment as per the agreement would make the agreement terminable as per clause 7. Perusal of Clause 7 shows that the agreement stands terminated automatically on failure to pay the amount of security deposit of Rs.15 lakh as agreed. Thus, prima facie I do not find any infirmity in the action of the Respondent in terminating the agreement. In my opinion, the

Respondent was fully justified in terminating the agreement. As I find that the main reason for terminating the agreement was non-payment, I offered it to the Petitioner that the Petitioner should pay the amount in arrears as per the agreement to the Respondent without prejudice to his rights and contentions and with liberty to apply before the arbitrator for adjustment or for refund. But the Petitioner refused to accept this suggestion. The intention in my opinion, is clear that the Petitioner wants to enjoy the property, which has come to him under the agreement without abiding by the terms of the agreement.

6. It was contended that the articles of the Petitioner are lying inside the premises and if interim order is not made the Respondent will enter the premises. Perusal of the agreement, however, shows that the premises were always in possession of the Respondent. The Petitioner was merely permitted to conduct the business there. In fact, one of the reasons for bringing about an end to the agreement is the conduct of the Petitioner claiming that he is in possession of the premises. Merely, because some of the articles of the Petitioner are lying inside the

premises, the Petitioner cannot be permitted to carry on his business in the premises without making any payment. Similarly, the court can not make any order which will restrain the Respondent from using the premises which admittedly belongs to him. If it is so done it will result in Respondent suffering further loss. Even assuming that some of the articles lying in the premises belong to the Petitioner and even if it is ultimately found that the Petitioner has suffered any loss, that loss is capable of being calculated in terms of money and the Petitioner can be compensated. But if any interim order is made either permitting the Petitioner to carry on business or preventing the Respondent from utilising the premises which admittedly belong to him, in my opinion, loss which will be suffered by the Respondent would not be able to be calculated in terms of money.

7. Taking overall view of the matter, therefore, in my opinion, the only order that can be made is to dismiss the petition making the Petitioner liable to pay the costs of this petition. Petition is, therefore, rejected. Ad-interim order granted earlier is vacated.

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